

**NOTICE OF PROPOSED RULEMAKING**

**TITLE 9. HEALTH SERVICES**

**CHAPTER 28. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM**

**LONG-TERM CARE SYSTEM**

**PREAMBLE**

**1. Sections Affected**

**Rulemaking Action**

R9-28-801	New Section
R9-28-802	New Section
R9-28-803	New Section
R9-28-804	New Section
R9-28-805	New Section
R9-28-806	New Section
R9-28-807	New Section
R9-28-901	Amend
R9-28-910	Amend
R9-28-911	Amend
R9-28-912	Amend
R9-28-913	Amend
R9-28-914	Amend
R9-28-915	Amend
R9-28-916	Amend
R9-28-917	Amend
R9-28-918	Amend
R9-28-919	Amend

**2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statute: A.R.S. § 36-2935, 36-2956.

Implementing statute: A.R.S. § 36-2935, 36-2956.

**3. A list of all previous notices appearing in the Register addressing the proposed rule:**

Notice of Rulemaking Docket Opening: 14 A.A.R. [To be filled in by the Editor (page #), (date)]

**4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name: Mariaelena Ugarte

Address: AHCCCS  
Office of Legal Assistance  
701 E. Jefferson, Mail Drop 6200  
Phoenix, AZ 85034  
Telephone: (602) 417-4693  
Fax: (602) 253-9115  
E-mail: AHCCCSRules@azahcccs.gov

**5. An explanation of the rule, including the agency's reasons for initiating the rule:**

The AHCCCS Administration proposes to amend the sections identified above as a result of a Five Year Review Report approved by the Governor's Regulatory Review Council on May 6, 2008. The subjects requiring amendment are the definitions, payor of last resort requirements, cost avoidance requirements and other technical changes.

**6. A reference to any study relevant to the rule that the agency reviewed and either proposes to rely on in its evaluation of or justification for the rule or proposes not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

The Administration did not review any study relevant to these rules.

**7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable

**8. The preliminary summary of the economic, small business, and consumer impact:**

It is anticipated that the contractors, private sector, members, providers, small businesses, political subdivisions, the Department, and the Administration will be minimally impacted by the changes to the rule language. The areas requiring revision are for clarity as a result of a 5 Year Rule Review approved by the Governor's Regulatory Review Council.

**9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:**

Name: Mariaelena Ugarte  
Address: AHCCCS  
Office of Legal Assistance  
701 E. Jefferson, Mail Drop 6200  
Phoenix, AZ 85034  
Telephone: (602) 417-4693  
Fax: (602) 253-9115

E-mail: AHCCCSRules@azahcccs.gov

Proposed rule language will be available on the AHCCCS website [www.azahcccs.gov](http://www.azahcccs.gov) the week of June 2, 2008. Please send written comments to the above address by 5:00 p.m., July 15, 2008. E-mail comments will also be accepted during this timeframe.

**10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rule, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:**

Date:	July 15, 2008
Time:	10:00 a.m.
Location:	AHCCCS 701 East Jefferson Phoenix, AZ 85034
Nature:	Public Hearing
Date:	July 15, 2008
Time:	10:00 a.m.
Location:	ALTCS: Arizona Long-Term Care System 110 South Church, Suite 1360 Tucson, AZ 85701
Nature:	Public Hearing
Date:	July 15, 2008
Time:	10:00 a.m.
Location:	ALTCS: Arizona Long-Term Care System 3480 East Route 66 Flagstaff, AZ 86004
Nature:	Public Hearing

**11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

None

**12. Incorporations by reference and their location in the rules:**

None

**13. The full text of the rules follows:**

## **TITLE 9. HEALTH SERVICES**

### **CHAPTER 28. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM**

#### **ARIZONA LONG-TERM CARE SYSTEM**

#### **ARTICLE 8. ~~REPEALED~~ TEFRA LIENS AND RECOVERIES**

##### Section

R9-28-801. ~~Repealed~~ Definitions related to TEFRA Liens

R9-28-801.01 TEFRA Liens-General

R9-28-802. ~~Repealed~~ TEFRA Liens-Affected Members

R9-28-803. ~~Repealed~~ TEFRA Liens-Prohibitions

R9-28-804. ~~Repealed~~ TEFRA Liens-AHCCCS Notice of Intent

R9-28-805. TEFRA Liens and Estate Recovery-Member's Request for a State Fair Hearing

R9-28-806. TEFRA Liens-Recovery

R9-28-807. TEFRA Liens-Release

#### **ARTICLE 9. FIRST- AND THIRD-PARTY LIABILITY AND RECOVERIES**

##### Section

R9-28-901. Definitions

R9-28-910. Recoveries

R9-28-911. Estate Recovery and Undue Hardship

R9-28-912. Partial Recovery

R9-28-913. ~~TEFRA Liens-General~~ Repealed

R9-28-914. ~~TEFRA Liens-Affected Members~~ Repealed

R9-28-915. ~~TEFRA Liens-Prohibitions~~ Repealed

R9-28-916. ~~TEFRA Liens-AHCCCS Notice of Intent~~ Repealed

R9-28-917. ~~TEFRA Liens and Estate Recovery-Member's Request for a State Fair Hearing~~ Repealed

R9-28-918. ~~TEFRA Liens-Recovery~~ Repealed

R9-28-919. ~~TEFRA Liens Release~~ Repealed

## TITLE 9. HEALTH SERVICES

### CHAPTER 28. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM

#### ARIZONA LONG-TERM CARE SYSTEM

#### ARTICLE 8. ~~REPEALED~~ TEFRA LIENS AND RECOVERIES

##### **R9-28-801. ~~Repealed~~ Definitions related to TEFRA Liens**

In addition to the definitions in A.R.S. §§ 36-2901 and 36-2931, 9 A.A.C. 22, Article 1, and 9 A.A.C. 28, Article 1, the following definitions apply to this Article:

"Consecutive days" means days following one after the other without an interruption based on discharge.

"File" means the date that AHCCCS receives a request for a State Fair Hearing under R9-28-805, as established by a date stamp on the request or other record of receipt.

"Home" means property in which a member has an ownership interest and which serves as the member's principal place of residence. This property includes the shelter in which a member resides, the land on which the shelter is located, and related outbuildings.

"Recover" means that AHCCCS takes action to collect from a claim.

"Spouse" means husband and wife as defined in R9-22-101.

"TEFRA lien" means a lien under 42 U.S.C. 1396p of the Tax Equity and Fiscal Responsibility Act of 1982.

##### **R9-28-801.01. ~~Repealed~~ TEFRA Liens**

Purpose. The purpose of TEFRA is to allow AHCCCS to file a lien on an AHCCCS member's interest in any real property before the member is deceased, including but not limited to life estates and beneficiary deeds.

##### **R9-28-802. ~~Repealed~~ TEFRA Liens-Affected Members**

**A.** Except for members under R9-28-803, AHCCCS shall file a TEFRA lien against the real property of all members who are:

1. Receiving ALTCS services,
2. 55 years of age or older, and
3. Permanently institutionalized.

**B.** A rebuttable presumption exists that a member is permanently institutionalized if the member has continually resided in a nursing facility, ICF/MR, or other medical institution defined in 42 CFR 435.1010 for 90 or more

consecutive days. A member may rebut the presumption by providing a written opinion from a treating physician, rendered to a reasonable degree of medical certainty, that the member's condition is likely to improve to the point that the member will be discharged from the medical institution and will be capable of returning home by a date certain.

**R9-28-803. Repealed-TEFRA Liens-Prohibitions**

AHCCCS shall not file a TEFRA lien against a member's home if one of the following individuals is lawfully residing in the member's home:

1. Member's spouse;
2. Member's child who is under the age of 21;
3. Member's child who is blind or disabled under 42 U.S.C. 1382c; or
4. Member's sibling who has an equity interest in the home and who was residing in the member's home for at least one year immediately before the date the member was admitted to the nursing facility, ICF/MR, or other medical institution as defined under 42 CFR 435.1010.

**R9-28-804. Repealed TEFRA Liens-AHCCCS Notice of Intent**

**A.** Time-frame. At least 30 days before filing a TEFRA lien, AHCCCS shall send the member or member's representative a Notice of Intent.

**B.** Content of the notice of intent. The Notice of Intent shall include the following information:

1. A description of a TEFRA lien and the action that AHCCCS intends to take,
2. How a TEFRA lien affects a member's property,
3. The legal authority for filing a TEFRA lien,
4. The time-frames and procedures involved in filing a TEFRA lien,
5. The member's right to request an exemption.

**C.** Request for exemption. A member or a member's representative may request an exemption. To request an exemption the member or the member's representative shall submit a written statement to AHCCCS within 30 days from the receipt of the Notice of Intent describing the factual basis for a claim that the property should be exempt from placement of a TEFRA lien or from recovery of lien based on R9-28-802, R9-28-803 or R9-28-806. AHCCCS shall respond to the member or member's representative in writing within 30 days of receiving a request for exemption, unless the parties mutually agree to a longer period of time.

**R9-28-805. TEFRA Liens and Estate Recovery-Member's Request for a State Fair Hearing**

- A.** If the member or member's representative does not request an exemption under 804(C), the member or representative is sent an AHCCCS Notice of TEFRA Lien. The member or representative may request a State Fair Hearing. The request must be filed within 30 days of the receipt of the AHCCCS Notice of a TEFRA Lien.
- B.** If the member requests an exemption and that request is denied, the member or representative is sent the AHCCCS Denial of a Request for Exemption. The member or representative may request a State Fair Hearing. The request must be filed within 30 days of the receipt of the AHCCCS Denial of Request for Exemption. The member or representative is then sent the AHCCCS Notice of a TEFRA Lien pursuant to A.
- C.** Hearings regarding TEFRA liens shall be conducted under AAC Title 9, Ch 34, Article 1.

**R9-28-806. TEFRA Liens-Recovery**

- A.** AHCCCS shall seek to recover a TEFRA lien upon the sale or transfer of the real property subject to the lien. However, AHCCCS shall not seek to recover the TEFRA lien or attempt recovery against any real property subject to the TEFRA lien so long as the member is survived by the member's:
- 1.** Spouse,
  - 2.** Child under the age of 21, or
  - 3.** Child who receives benefits under either Title II or Title XVI of the Social Security Act as blind or disabled, as defined under 42 U.S.C. 1382c.
- B.** AHCCCS shall not recover a TEFRA lien on an individual's home if the member is survived by:
- 1.** A sibling of the member who currently resides in the deceased member's home and who was residing in the member's home for a period of at least one year immediately before the date of the member's admission to the nursing facility, ICF/MR, or other medical institution as defined under 42 CFR 435.1010; or
  - 2.** A child of the member resides in the deceased member's home who:
    - a.** Was residing in the member's home for a period of at least two years immediately before the date of the member's admission to the nursing facility, ICF/MR, or other medical institution as defined under 42 CFR 435.1010; and
    - b.** Provided care to the member, which allowed the member to reside at home rather than in an institution.



C. To determine whether a child of the member provided care under subsection (B)(2), AHCCCS shall require the following information:

1. Physician's statement that describes the member's physical condition and service needs for the previous two years;
2. Verification that the child actually lived in the member's home;
3. Statement from the child providing the services that describes and attests to the services provided;
4. Any statement made by the member prior to death regarding the services received; and
5. Statement from physician, friend, or relative as witness to the care provided.

#### **R9-28-807. TEFRA Liens-Release**

AHCCCS shall issue a release of a TEFRA lien within 30 days of:

1. Satisfaction of the lien; or
2. Notice that the member has been discharged from the nursing facility, ICF/MR, or other medical institution, defined under 42 CFR 435.1010, and the member has returned home and is physically residing in the home with the intention of remaining in the home. Discharge to an alternative HCBS setting defined at R9-28-101 does not constitute a return to the home.
3. Notice of the member's death, when a lien has been filed on a life estate.

### **ARTICLE 9. FIRST- AND THIRD-PARTY LIABILITY AND RECOVERIES**

#### **R9-28-901. Definitions**

In addition to the definitions in A.R.S. §§ 36-2901 and 36-2931, 9 A.A.C. 22, Article 1, and 9 A.A.C. 28, Article 1, the following definitions apply to this Article:

1. "Consecutive days" means days following one after the other without an interruption based on discharge.
2. "Estate" has the meaning in A.R.S. § 14-1201.
3. "File" means the date that AHCCCS receives a request for a State Fair Hearing under R9-28-917, as established by a date stamp on the request or other record of receipt.
4. "Home" means property in which a member has an ownership interest and which serves as the member's principal place of residence. This property includes the shelter in which a member resides, the land on which the shelter is located, and related outbuildings.

5. "Member" means a person eligible for AHCCCS-covered services under A.R.S. Title 36, Chapter 29, Article 2.
6. ~~"Place" means AHCCCS recording a lien on a member's property with the judicial system.~~
7. "Recover" means that AHCCCS takes action to collect from a claim.
8. ~~"TEFRA lien" means a lien under 42 U.S.C. 1396p of the Tax Equity and Fiscal Responsibility Act of 1982.~~

#### **R9-28-910. Recoveries**

AHCCCS shall recover funds paid predeath or after death of a member for ALTCS benefits including: capitation payments, Medicare Parts A and B premium payments, coinsurance and deductibles paid by AHCCCS, fee-for-service payments, and reinsurance payments from:

1. The estate of a member who was 55 years of age or older when the member received benefits; or
2. The estate or the property of a member under A.R.S. §§ 36-2935, 36-2956 and 42 U.S.C. 1396p.

#### **R9-28-911. Estate Recovery and Undue Hardship**

**A.** Any recovery of a claim by AHCCCS against a member's estate shall be made only after the death of the member's surviving spouse and only at a time:

1. When there exists no surviving minor child under age 21; and
2. When there exists no surviving child who receives benefits under either Title II or Title XVI of the Social Security Act because the child is blind or disabled as defined in 42 U.S.C. 1382c.

**B.** Undue hardship request. A member's representative may request an undue hardship. If the member's representative wishes to request an undue hardship, within 30 days from the receipt of the notification of AHCCCS claim against the estate the member's representative shall submit a written statement to AHCCCS describing the factual basis for a claim that the property should be exempt from estate recovery as provided under this Section. AHCCCS shall respond to the member or member's representative in writing within 30 days of receiving an undue hardship request, unless the parties mutually agree to a longer period of time.

**C.** AHCCCS shall waive a claim against a member's estate because of undue hardship if any of the following situations exist:

1. The estate consists only of real property that is listed as residential property by the Arizona Department of Revenue or County Assessor's Office, and the heir or devisee:

- a. Owns a business that is located at the residential property and:
  - i. The business was in operation at the residential property for at least 12 months preceding the death of the member,
  - ii. The business provides more than 50 percent of the heir's or devisee's livelihood, and
  - iii. The recovery of the property would result in the heir losing the heir's or devisee's means of livelihood; or
- b. Currently resides in the residence and:
  - i. Resided there at the time of the member's death,
  - ii. Made the residence his or her primary residence for the 12 months immediately before the death of the member, and
  - iii. Owns no other residence; or
- 2. The estate consists only of personal property, and
  - a. The heir or devisee's annual gross income for the household size is less than 100 percent of the Federal Poverty Level (FPL). New sources of income such as employment or Social Security that may not have yet been received, are included in determining the household's annual gross income; and
  - b. The heir or devisee does not own a home, land, or other real property.
- D.** When the estate consists of both personal property and real property that qualify for the undue hardship criteria at subsection (B), AHCCCS shall not grant an undue hardship waiver; however, AHCCCS shall adjust its claim to the value of the personal property.
- ~~**E.** Subsections (A), (B), and (C) are not applicable to TEFRA liens.~~
- F.** AHCCCS shall exempt the following income, resources, and property of Native Americans (NA) and Alaska Natives (AN) from estate recovery:
  - 1. Income and resources from tribal land and other resources currently held in trust and judgment funds from the Indian Claims Commission or U.S. Claims Court;
  - 2. Ownership interest in trust or non-trust property;
  - 3. Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources;

4. Any other ownership interests in or property rights that have unique religious, spiritual, traditional, or cultural significance or rights that support subsistence or a traditional life style according to applicable Tribal law or custom; and
5. Income left as a remainder in an estate derived from any property listed in subsection (E)(1)-(4), that was either collected by a NA, or by a Tribe or Tribal organization and distributed to a NA.

#### **R9-28-912. Partial Recovery**

AHCCCS shall use the following factors in determining whether to seek a partial recovery or an alternative recovery of funds when an heir or devisee does not meet the requirements of R9-28-911 and requests a partial recovery:

1. Financial and medical hardship to the heir or devisee;
2. Income of the heir or devisee and whether the heir or devisee's household gross annual income is less than 100 percent of the FPL;
3. Resources of the heir or devisee;
4. Value and type of assets;
5. Amount of AHCCCS' claim against the estate; and
6. Whether other creditors have filed claims against the estate or have foreclosed on the property.

#### **~~R9-28-913. TEFRA Liens-General~~**

- ~~A. Purpose. The purpose of TEFRA is to allow AHCCCS to place a lien on an AHCCCS member's real property before the member is deceased or to place a lien on a deceased member's estate.~~
- ~~B. Life estates and beneficiary deeds. Except for members under R9-28-915, AHCCCS shall place a TEFRA lien on a member's real property interest held in a life estate or beneficiary deed created before or after the member's eligibility. Except for members under R9-28-918, AHCCCS shall enforce recovery against the remainder beneficiary following the member's death or upon transfer of the property.~~
- ~~C. Recovery. As provided under R9-28-918, AHCCCS shall recover a TEFRA lien under R9-28-910.~~

#### **~~R9-28-914. TEFRA Liens-Affected Members~~**

- ~~A. Except for members under R9-28-915, AHCCCS shall place a TEFRA lien against the real property of all members who are:~~
- ~~1. Receiving ALTCS services;~~

2. ~~55 years of age or older, and~~
3. ~~Permanently institutionalized.~~

B. ~~A rebuttable presumption exists that a member is permanently institutionalized if the member has continually resided in a nursing facility, ICF/MR, or other medical institution defined in 42 CFR 435.1009 for 90 or more consecutive days. A member may rebut the presumption by providing a written opinion from a treating physician, rendered to a reasonable degree of medical certainty, that the member's condition is likely to improve to the point that the member will be discharged from the medical institution and will be capable of returning home by a date certain.~~

#### **~~R9-28-915. TEFRA Liens Prohibitions~~**

~~AHCCCS shall not place a TEFRA lien against a member's home if one of the following individuals is lawfully residing in the member's home:~~

1. ~~Member's spouse;~~
2. ~~Member's child who is under the age of 21;~~
3. ~~Member's child who is blind or disabled under 42 U.S.C. 1382c; or~~
4. ~~Member's sibling who has an equity interest in the home and who was residing in the member's home for at least one year immediately before the date the member was admitted to the nursing facility, ICF/MR, or other medical institution as defined under 42 CFR 435.1009.~~

#### **~~R9-28-916. TEFRA Liens AHCCCS Notice of Intent~~**

A. ~~Time frame. At least 30 days before filing a TEFRA lien, AHCCCS shall send the member or member's representative a Notice of Intent.~~

B. ~~Content of the notice of intent. The Notice of Intent shall include the following information:~~

1. ~~A description of a TEFRA lien and the action that AHCCCS intends to take,~~
2. ~~How a TEFRA lien affects a member's property,~~
3. ~~The legal authority for filing a TEFRA lien,~~
4. ~~The time frames and procedures involved in filing a TEFRA lien,~~
5. ~~The member's right to request a State Fair Hearing, and~~
6. ~~The process and time frames for requesting a State Fair Hearing.~~

~~C. Request for exemption. A member's representative may request an exemption. To request an exemption the member or the member's representative shall submit a written statement to AHCCCS within 30 days from the receipt of the Notice of Intent describing the factual basis for a claim that the property should be exempt from placement of a TEFRA lien or from recovery of lien based on R9 28 914(B), R9 28 915 or R9 28 918. AHCCCS shall respond to the member or member's representative in writing within 30 days of receiving a request for exemption, unless the parties mutually agree to a longer period of time.~~

**~~R9 28 917. TEFRA Liens and Estate Recovery Member's Request for a State Fair Hearing~~**

~~A. A member or member's representative may request a State Fair Hearing:~~

- ~~1. Within 30 days of the receipt of AHCCCS' Notice of Intent or notification of AHCCCS' claim against the estate; or~~
- ~~2. Within 30 days of receipt of a denial of a request for exemption under R9 28 916(C) or denial of a request to waive estate recovery because of undue hardship under R9 28 911(B).~~

~~B. Hearings regarding AHCCCS' intent to place a TEFRA lien shall be conducted under A.A.C. Title 9, Chapter 34, Article 1.~~

**~~R9 28 918. TEFRA Liens Recovery~~**

~~A. AHCCCS shall seek to recover a TEFRA lien upon the sale or transfer of the real property subject to the lien. However, AHCCCS shall not seek to recover the TEFRA lien or attempt recovery against any real property subject to the TEFRA lien so long as the member is survived by the member's:~~

- ~~1. Spouse;~~
- ~~2. Child under the age of 21; or~~
- ~~3. Child who receives benefits under either Title II or Title XVI of the Social Security Act as blind or disabled, as defined under 42 U.S.C. 1382c.~~

~~B. AHCCCS shall not recover a TEFRA lien on an individual's home if the member is survived by:~~

- ~~1. A sibling of the member who currently resides in the deceased member's home and who was residing in the member's home for a period of at least one year immediately before the date of the member's admission to the nursing facility, ICF/MR, or other medical institution as defined under 42 CFR 435.1009; or~~
- ~~2. A child of the member resides in the deceased member's home who:~~

- a. ~~Was residing in the member's home for a period of at least two years immediately before the date of the member's admission to the nursing facility, ICF/MR, or other medical institution as defined under 42 CFR 435.1009; and~~
  - b. ~~Provided care to the member, which allowed the member to reside at home rather than in an institution.~~
- C. ~~To determine whether a child of the member provided care under subsection (B)(2), AHCCCS shall require the following information:~~
- 1. ~~Physician's statement that describes the member's physical condition and service needs for the previous two years;~~
  - 2. ~~Verification that the child actually lived in the member's home;~~
  - 3. ~~Statement from the child providing the services that describes and attests to the services provided;~~
  - 4. ~~Any statement made by the member prior to death regarding the services received; and~~
  - 5. ~~Statement from physician, friend, or relative as witness to the care provided.~~

**~~R9-28-919. TEFRA Liens Release~~**

~~AHCCCS shall issue a release of a TEFRA lien within 30 days of:~~

- 1. ~~Satisfaction of the lien; or~~
- 2. ~~Notice that the member has been discharged from the nursing facility, ICF/MR, or other medical institution, defined under 42 CFR 435.1009, and the member has returned home and is physically residing in the home with the intention of remaining in the home. Discharge to an alternative HCBS setting defined at R9-28-101(B) does not constitute a return to the home.~~